Nos. 18-1640 & 18-1973

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CROZER-CHESTER MEDICAL CENTER AND
DELAWARE COUNTY MEMORIAL HOSPITAL,

Petitioners/Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent/Cross-Petitioner.

On Petition for Review and Cross-Petition for Enforcement
from the National Labor Relations Board

Case Nos. 04-CA-172296 & 04-CA-172313

Petitioners/Cross-Respondents' Third Step Brief

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Introduction and Summary of Argument

What is the remedy when a labor union refuses to negotiate with an employer over disclosure of information subject to a confidentiality agreement? According to the briefing of the Board and Union here, the employer is to be punished for the union's intransigence. But, according to more or less every decision to consider information-disclosure obligations under the National Labor Relations Act, the employer has the right and the obligation, when asserting a confidentiality interest over information sought by a union, to discuss its confidentiality concern with the union and negotiate an accommodation of both its concern and its bargaining obligations. Crozer sought to do just that, but the Union rebuffed the attempt, stating that it would refuse to negotiate the matter unless Crozer waived its statutory right to withhold information not relevant to the Union's bargaining duties. That is the reason why, despite Crozer's offer to produce any relevant information pursuant to a confidentiality agreement with the Union, JA73, the parties were unable to reach an agreement, while Crozer was able to reach agreements and disclose the very same Purchase Agreement to two other unions that did not obstruct accommodation, JA74–JA75. And now, the Board and Union argue, Crozer should be punished for the Union's refusal to bargain and forced to disclose information to which the Union would otherwise have no right without any confidentiality protections.

Make no mistake, the Union's position that Crozer would have to produce the entire Purchase Agreement before the Union would even discuss relevance or confidentiality was unsupportable, both as a matter of procedure and

substance. The Union's obligation was to apprise Crozer of "the *basis* for its bargaining demand," including both "the reason and/or authority for its request" and "*facts* tending to support" it. *Hertz Corp. v. N.L.R.B.*, 105 F.3d 868, 874 (3d Cir. 1997) (emphasis in original). The Union's boilerplate reference to "effects bargaining" was simply too vague to meet this burden, and nothing in the context of negotiations rendered the Union's thinking "readily apparent" to Crozer. *Id.* at 874. To the contrary, the Union's thinking remains inscrutable to this day. And Crozer made clear at the time that it did not understand the Union's reasoning and expressly invited the Union to explain its request. The Union refused, sticking to its unjustified demand that Crozer turn over everything so that the Union could figure out what it wanted and why.

The consequences of the Board's decision and remedy in this case should be apparent. For one, it would incentivize unions to make unreasonable demands for sensitive information from employers, knowing that they can force disclosure through sheer intransigence. For another, it would discourage the kind of informal conciliation and bargaining that the Act actively encourages. And it would undermine employers' ability to protect their confidential business information even in circumstances where they are willing to disclose it pursuant to a confidentiality agreement with the union. In short, a rule that allows unions to steamroll legitimate concerns regarding confidentiality and relevance of requested information is contrary to the Act's fundamental policy of promoting harmonious labor relations.

Argument

I. The Union, Not Crozer, Refused To Bargain Over the Terms of Disclosure

The Board and the Union fail to grapple with the fact that the Union derailed Crozer's lawful attempt to accommodate its confidentiality obligations and the Union's request for information. The record shows that the Union knew from the very beginning that Crozer was willing to negotiate an accommodation involving a confidentiality agreement but refused to so much as discuss the matter unless Crozer waived its right to withhold irrelevant or otherwise non-disclosable portions of the Purchase Agreement and hand over the entire thing. JA70; JA259. When Crozer again attempted to discuss an accommodation, at a bargaining session between the parties, the Union once again insisted that it would accept only the whole thing in derogation of Crozer's rights. JA206; JA262–JA264. And when Crozer wrote the Union again to propose "further discussions on this issue" and to suggest entering into a confidentiality agreement to accommodate the parties' respective interests, JA71–JA73, the Union maintained its position and declined to respond, JA220; JA238; JA263–JA264; JA296. In short, the Union's position, from start to finish, was that it would discuss accommodation only if Crozer preemptively waived its rights—a position that the Board recognized was "not sustainable." JA38.[1]

[1] The Union's claim that Crozer "refus[ed] to seek an accommodation until [the Union] agreed to take less than all relevant information" is false. Intervenor's Brief ("Union Br.") at 27. The email and letter it cites in support of that contention merely restate Crozer's position that "the entire [Purchase Agreement] is not relevant." JA69 (email); *see also* JA71–73 (letter) ("We again renew that offer

The Board argues that the Union's complete and unlawful intransigence is legally irrelevant. National Labor Relations Board Brief ("Board Br.") at 41–43. Crozer, it contends, had an obligation under the Act to "'sen[d] an email to the Union with a redacted version of the APA, including the list of schedules, along with a draft confidentiality agreement and an explanation as to why certain information was being withheld.'" Board Br. at 41 (quoting JA38). But that is the precise offer that Crozer made to the Union, JA72–JA73, and that the Union rejected, JA220; JA238; JA263–JA264; *see also* JA296.

Moreover, as Crozer explained to the Union, the Purchase Agreement was subject to a confidentiality agreement and so could be disclosed only under a confidentiality agreement with the Union, which the Union refused to discuss. JA73; *see, e.g.*, JA220. The Board argues (at 41–42) that Crozer was legally obligated to violate its confidentiality obligations, and waive its confidentiality interests, by disclosing the Purchase Agreement without any kind of confidentiality agreement in place with the Union, in the hope that the Union would nonetheless maintain the Purchase Agreement's confidentiality.

But the law is to the contrary: where a claim of confidentiality is involved, the employer is "not automatically obligated to furnish the requested information forthwith, but instead [is] entitled to discuss confidentiality concerns regarding the information request with the Union…." *Silver Bros. Co., Inc.*, 312 NLRB 1060, 1062 (1993). Indeed, the Board's only cited authority on

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to discuss which portions of the documents are relevant to [the Union's] role…."). Neither refuses to disclose relevant information.

this point, *U.S. Testing Co., Inc. v. N.L.R.B.*, 160 F.3d 14, 20 (D.C. Cir. 1998), confirms that an employer's obligation is to "offer to accommodate both its concern and its bargaining obligations, as is often done by making an offer to release information conditionally or by placing restrictions on the use of that information." The whole reason for that rule, it explains, is to "allow[] the parties to work out through an informal process how their corresponding duties and responsibilities can be met." *Id.* at 21. Crozer sought to pursue such an accommodation, and the record is clear that the only reason that process did not play out was that the Union refused to participate.

By contrast, Crozer was able to reach accommodations with two other unions that were willing to talk and that ultimately agreed "to maintain confidentiality of the [Purchase Agreement]." JA75. The Board suggests (at 44) that that production somehow undercuts Crozer's confidentiality argument, but it ignores that Crozer was able to reach confidentiality agreements with those other unions *before* disclosing the redacted Purchase Agreement to them. JA75. The key difference was that those unions negotiated with Crozer to reach an accommodation, while the Union refused to do so.

Both the Board and the Union argue at length that Crozer's confidentiality interests are insufficient to justify its withholding the Purchase Agreement, but that argument misses the mark for two reasons.

The first is that, regardless of whether those interests ultimately support withholding the Agreement, in whole or in part, they entitled Crozer to seek an

accommodation (e.g., a confidentiality agreement) with the Union. Crozer explained in its opening brief, and neither the Board nor the Union disputes, that a legitimate confidentiality interest at a minimum entitles an employer to first discuss its confidentiality concerns with the union before making any disclosure. *See, e.g., Silver Bros.*, 312 NLRB at 1060–61 (finding that the employer "was entitled to discuss the confidentiality concerns with the Union before turning over the information"). That principle is recognized by the Board's principal authority, *see U.S. Testing Co.*, 160 F.3d at 20–21 & n.3, and by the authorities cited by the Union (at 27). *See U.S. Postal Serv.*, 364 NLRB No. 27, at *2 (2016) (citing *Olean Gen. Hosp.*, 363 NLRB No. 62, at *6 (2015), for the proposition that "employer's asserted confidentiality interest 'does not end the matter'; employer must also notify union in a timely manner and seek to accommodate the union's request and confidentiality concerns"); *Providence Hosp. v. N.L.R.B.*, 93 F.3d 1012, 1020–21 (1st Cir. 1996) (The "proper procedural sequence" is for the employer to "advance its claim of confidentiality in its response to the union's information request. Only in that way will the parties have a fair opportunity to confront the problem head-on and bargain for a partial disclosure that will satisfy the legitimate concerns of both sides."); *Mary Thompson Hosp. v. N.L.R.B.*, 943 F.2d 741, 747 (7th Cir. 1991) (faulting employer that did not attempt to "discuss its confidentiality concerns, or possible methods of alleviating them, with the Union"). Indeed, the Union's brief itself recognizes that "'the employer has the burden to seek an accommodation that will meet the needs of both parties.'" Union Br. at 25 (quoting *Nat'l Steel Corp.*,

335 NLRB 747, 748 (2001)). And that is what Crozer repeatedly sought to do, putting the ball the Union's court. But the Union, rather than play the game as the Act requires, took the ball and went home.

Second, Crozer does have substantial confidentiality interests in the Purchase Agreement. As is typical for agreements governing the sales of businesses, it required the parties, as a condition of closing, to "maintain the strict confidentiality" of the Agreement and the information contained in it. JA168 at ¶ 12.1. And, as Crozer explained in its opening brief, the Purchase Agreement's schedules contain the kind of business and financial information that the Board and the courts have long recognized merits protection under law. Petitioner's Opening Brief ("Crozer Br.") at 32–33 (citing cases). Against this, the Board (at 37) and Union (at 25) fault Crozer for not going into greater detail with the Union concerning its confidentiality interests and making only a "naked" claim of confidentiality. But Crozer did explain that the Agreement was "subject to legal prohibitions on disclosure," JA73, and that the Agreement contained "confidential and proprietary" information, JA69. And it stated that, if the parties were able to identify relevant material, Crozer would disclose that material under a confidentiality agreement with the Union. *See, e.g.*, JA73. The Union, however, rejected that offer, JA220; JA238; JA263–JA264; *see also* JA296, and so Crozer was never put to the test of having to identify specific materials, if any, that it would ultimately seek to withhold on

confidentiality grounds. The fact that the Union short-circuited the required accommodation process by refusing to bargain cannot be taken as a waiver of Crozer's confidentiality rights and interests.

In sum, Crozer satisfied its obligation to "notify the union in a timely manner and seek to accommodate the union's request and the confidentiality concern." *Olean Gen. Hosp.*, 363 NLRB No. 62, at *9. But the Union's position that it would not even discuss the matter unless Crozer agreed in advance to turn over the Purchase Agreement in its entirety in derogation of Crozer's statutory rights torpedoed the accommodation process. That was not the result of any unfair labor practice by Crozer.

II. Crozer Had No Obligation To Comply with an Unexplained and Unsupported Demand for Information

Not only did the Union frustrate Crozer's lawful attempt to assert confidentiality, but it also refused even to properly apprise Crozer of the basis of its request. Its failure to establish relevance stymied Crozer's effort to understand its asserted need for the Purchase Agreement and reasonably accommodate it.

"[A]n agreement of sale of a business…is not presumptively relevant as it does not relate directly to the terms and conditions of employment of the employees represented by the union." *Uniontown Cty. Mkt.*, 326 NLRB 1069, 1071 (1998); *Super Valu Stores*, 279 NLRB 22, 25 (1986) (same). Thus, as to a demand for such an agreement, "only after an employer has had an opportunity to consider the basis for" the demand "can the employer violate the NLRA by rejecting the demand." *N.L.R.B. v. U.S. Postal Serv.*, 18 F.3d 1089, 1102 n.7 (3d

Cir. 1994). The record shows that Crozer could not have violated the NLRA because it was never informed of the basis for the Union's demand; it received only vague representations that the Purchase Agreement might relate to "effects bargaining" with no further information, clarification, or support for the information demand.

On this *factual* point, the parties are in agreement. The Board contends in the alternative either that the reference to effects bargaining is itself sufficient notice or that "the context surrounding the Union's request" adds the necessary clarity. Board Br. at 25. For its part, the Union also relies on the stated reference to effects bargaining and on the circumstances surrounding "fast approaching" negotiations for "initial contracts for the DCMH nurses." Union Br. at 22 (quotation marks omitted). But neither the Board nor the Union cites any "oral or written communication" setting forth "*facts* tending to support" the demand for the Agreement. *Hertz Corp. v. N.L.R.B.*, 105 F.3d 868, 874 (3d Cir. 1997) (emphasis in original). They contend only that the fragments of information before Crozer satisfied the Union's burden and that Crozer faced the impossible task of reading the Union's mind in assessing what portions, if any, of the Agreement were relevant.

This contravenes "the legal standard mandated by [Circuit] precedent." *Id.* at 873. The minimal references to the Union's need for the Purchase Agreement are not legally sufficient to meet the Union's burden to show relevance.

And the theory that Crozer somehow conceded relevance by inviting the Union to explain its reasoning amounts to an impermissible attempt to shift the burden onto Crozer.

A. The Reference to "Effects Bargaining" Is Not Sufficient on Its Own

The Board contends (at 25) that the Union satisfied its burden to establish relevance by stating simply that it "sought the APA 'for effects bargaining.'" That argument, however, was not the basis of the NLRB's order, and there is good reason for that: the Board's precedent squarely forecloses it. In *Super Valu Stores*, 279 NLRB at 25, the Board (adopting the ALJ's opinion) addressed a request for sales purchase agreements for the following stated purpose: "to permit the Union to more effectively represent unit employees in effects bargaining." The Board concluded that this statement "is, standing alone, inadequate" because "[t]he Union's theory of relevance must be reasonably specific; general avowals of reliance such as 'to bargain intelligently' and similar boilerplate are insufficient." *Id.* at 25 (quoting *Soule Glass & Glazing Co. v. N.L.R.B.*, 652 F.2d 1055, 1099 (1st Cir. 1981)). That is in accord with this Circuit's rule that a union must "communicate the *basis* for its bargaining demand" and "*facts* tending to support" its need. *Hertz*, 105 F.3d at 874 (emphasis in original). *Super Valu Stores* demonstrates how that principle applies in the context of a demand for an asset-purchase agreement. A stated need for use in "effects bargaining" is plainly insufficient.

To be sure, *Super Valu Stores* went on to conclude that a more specific basis for the request that the union also tendered—that "details of the transactions" would indicate "what entity is liable for the payment of certain unfunded liability to the [pension] fund"—satisfied the union's obligation to show relevance. 279 NLRB at 26. But that just demonstrates how the Union here *could* have made a more specific showing but did not. The Union did not go any further in articulating the basis for its need. The only thing the Union's and Board's cited decisions establish is that a union may be able to make a specific enough demand to demonstrate need for a sales agreement (or portions of it), underscoring the Union's failure to do so.

For example, the Board (at 25) relies on *Transcript Newspapers*, 286 NLRB 124 (1987), but that case involved detailed substantiation of a demand for a sale agreement to allow the union to determine "whether reserves had been established to meet potential liabilities concerning contract negotiations or effects bargaining negotiations for such things as health insurance premiums, severance pay and pension contributions," whether "the agreement might provide for financial reserves to cover items negotiated during effects bargaining," "whether the agreement provided the sale might not be completed unless [the seller] provided protection for its existing work force," and "whether [the union] was entitled to bargain over terms of a collective-bargaining agreement or whether bargaining would be limited only to the effects of the production termination." *Id.* at 127. The union in that case communicated all of these

needs directly to the employer and thereby met its prima facie relevance burden. That is what a specific showing of "*facts* tending to support" a union's stated need looks like. *Hertz*, 105 F.3d at 874.

The Board's and Union's other authorities also involved specific articulations of relevance. *See Compact Video Servs., Inc.*, 319 NLRB 131, 143 (1995) (finding purchase agreement relevant based on representation that the union needed it to ascertain "whether or not the 'sale' involved the substitution of a mere alter ego of the Respondent, and/or to help determine whether or not the sale would involve someone who owed a successor's duty to recognize and bargain with the Union," and it identified "pending grievances and a 'WARN Act lawsuit'" that was ongoing); *Sierra Int'l Trucks, Inc.*, 319 NLRB 948, 950–51 (1995) (request for an asset purchase agreement was supported by the specific assertion that it was needed "'to determine whether a continuing obligation to bargain exists and if not, to initiate bargaining for possible severance benefits'"); *Children's Hosp. of San Francisco*, 312 NLRB 920, 922, 930 (1993) (finding asset purchase agreement relevant where union notified employer that "there had been a recent reduction of staff despite assurances that the merger would not result in such action").

These precedents belie the Union's (at 19) and Board's (at 25) contention that, on the incantation "effects bargaining," a purchase agreement becomes relevant practically as a matter of law. If that were so, the Board would have simply held that sales agreements are presumptively relevant, since the right to effects bargaining virtually always is triggered by the sale of a business. *See*

N.L.R.B. v. Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc., 893 F.2d 1128, 1134 (9th Cir. 1990).[2] But, as the ALJ conceded below, "[t]he Board has not found such sales agreements to be presumptively relevant." JA13; *see also* JA37. And, if the Union's and Board's stated position were correct, other Board rulings would be nonsensical. For example, the Board has articulated a requirement that a union seeking an asset-purchase agreement for the purpose of making an alter-ego showing (to establish successor liability) demonstrate "a reasonable belief that enough facts existed to give rise to a reasonable belief that one entity was the alter ego of another." *Knappton Mar. Corp.*, 292 NLRB 236, 239 (1988). In the Union's and Board's view of the law, that is too stringent: the simple boilerplate stated need to make an alter ego showing would, like the boilerplate reference to "effects bargaining," be dispositive. That is not the law.

The law instead requires a showing of "*facts* that would have supported an objective basis for the Union's concerns." *Hertz*, 105 F.3d at 874 (emphasis in original). Here, that required, a minimum, a showing of what information in the Purchase Agreement would have a reasonable probability of bearing on the issues the Union intended to raise in effects bargaining. But the Union identified no "facts" at all in support of its demand and failed to satisfy its legal burden.

[2] *Rev'd in part on other grounds*, 501 U.S. 190 (1991).

B. The Union's and Board's Arguments About "Context" Do Not Satisfy Their Relevancy Burden

Perhaps recognizing their lead argument's frailty, the Union and Board both promptly retreat to variations of an alternative position that "context" fills in the gaping holes in the Union's relevancy showing. Board Br. at 25–27; Union Br. at 21–23. But the context here adds nothing to the Union's bare and unsupported demand.

The arguments are founded principally on *Hertz*'s dictum that, in some cases, "a union's reason" for the information request "will be readily apparent." 105 F.3d at 874. But the possibility that "a specific communication" in some instances "*may* be unnecessary" does not mean that it will always or even normally be unnecessary. *Id.* (emphasis added). To the contrary, *Hertz* found this standard unmet because the employer "could not readily determine the factual basis of the Union's claim" from the context of the request. *Id.* Notably, the employer *was* in possession of the information on which the union based its suspicion that the employer was engaged in discriminatory hiring (the topic of the information demand): "a list of bargaining unit employees broken down by job title" that the employer provided to the union under the CBA's terms. *Id.* at 870. So the mere possession of the information the union has in mind is not enough; instead, the context must apprise the employer of the "union's *reason*" for the request—that is, the union's actual thinking. Only when

the context readily enables the employer to connect the dots as the union believes they should be connected is "context" a possible substitute for the union's actual "communication" of its mode of dot-connecting to the employer.

Likely for that reason, the cases the Union and Board cite for their context argument all cite context as a *supplement* to requests that were not ideally specific, but were sufficient enough to get the message across. *See W. Penn Power Co. v. N.L.R.B.*, 394 F.3d 233, 243 (4th Cir. 2005) (addressing specific representations by the union of facts tending to show that contractors were being hired in violation of collective bargaining agreement's limitations on such hiring); *U.S. Testing Co. v. N.L.R.B.*, 160 F.3d 14, 19 (D.C. Cir. 1998) (addressing specific representations to "the Company during negotiations" that request for medical claims histories was justified by the need to assess company's claim of rising health-insurance costs as incurred by union and on-union employees, respectively); *Providence Hosp. v. N.L.R.B.*, 93 F.3d 1012, 1018 (1st Cir. 1996) (emphasizing that "the concrete (and somewhat unusual) factual circumstances" surrounding the merger at issue, including workforce reductions, afforded the "evidence" needed to establish relevance of a request for the merger agreement).

By contrast, the Union and Board argue that Crozer should have engaged in speculation or mind-reading. They both rely most heavily on what *the Union* subjectively believed. *See* Board Br. at 25 ("because of the *Union's* prior experience…it knew the APA would likely contain information relevant to bargaining") (emphasis added); Union Br. at 22 ("Here again, in light of

the…sale to Prospect, *PASNAP* held 'a reasonable belief' that the APA…had 'potential or probable relevance….'") (emphasis added). But the question is whether "the *employer* should have known the reason for the union's request for information." *Hertz*, 105 F.3d at 874 (emphasis added). The Union's subjective experience does not establish what Crozer did know or should have known.

Similarly, the Union's context argument consists merely of conclusory references (at 21) to "effects bargaining," which is merely a recapitulation of the argument that a boilerplate reference to "effects bargaining" is sufficient—an argument that fails for reasons stated above. If every employer should divine from a request for effects bargaining after a merger or acquisition what the union is interested in knowing from the asset purchase agreement, then the law would simply be that the agreement is presumptively relevant. The authorities, as discussed above, hold the opposite and therefore require more from a union. The Union promptly changes the subject (at 22) to vague needs in upcoming contract negotiations—even though the Board's decision does not rely on such needs and they were not even mentioned by the Union at the time as the basis for the information demand. The Union's argument is for a mind-reading standard that contradicts *Hertz* and every other decision on this issue.

The Board too relies (at 26) principally on vague references to a "host of questions regarding the effect of the sale on unit employees' terms and conditions of employment." This does not answer the critical question of what the

"*union's reason*" was for needing the information. *Hertz*, 105 F.3d at 874 (emphasis added). The Union, for example, took the position at the NLRB hearing that even terms regarding intellectual property rights and leased real property are relevant to its request, and its reasons for that remain inscrutable to this day. *See* Crozer Br. 23–29.[3] Even if it were obvious that the Union had a "host of questions," it was and remains not obvious at all *which* questions the Union had and which ones *it* believed the sales agreement might answer. Only with that information could Crozer have evaluated the request and determined which (if any) portions of the agreement were relevant.

That same flaw undermines the Board's reliance (at 26–27) on Crozer's letter to employees about the sale. The Board does not identify how Crozer could have known from its *own* letter what the *Union* would find relevant to effects bargaining. Crozer's letter stated what it believed would and would not change under the sales agreement, and the Union did not specify what errors the Union believed may underlie its representations or what issues it intended

[3] As Crozer's opening brief explains (at 23–29), the *post hoc* trial testimony relied upon by the ALJ and Board in their decisions cannot establish relevance. The Board (at 31) expressly disclaims any reliance on the *post hoc* trial testimony in support of its position, arguing that only "the facts presented to and known to Crozer at the time of the request and shortly thereafter" are relevant. Crozer agrees. *See* Crozer Opening Br. 18, 23. The Board's statement is an express relinquishment of the argument, waiving it. *See Kontrick v. Ryan*, 540 U.S. 443, 458 (2004). For its part, the Union ignores the trial testimony entirely, so any argument founded on it has been forfeited. *Garza v. Citigroup Inc.*, 881 F.3d 277, 284 (3d Cir. 2018) ("Raising an issue in a reply brief is too late.").

to raise in effects bargaining. This scenario is different from one where the employer makes "assurances" that a merger will not result in staff reduction, but reductions take place anyway—a context that, when referenced by the union, might demonstrate the *union's* reason for the demand without a fulsome articulation. *See Children's Hosp. of San Francisco*, 312 NLRB at 922, 930 (addressing that scenario). But *Crozer*'s letter to employees does not bridge the gap between the *Union's* bases for the information demand and *Crozer's* ability to know the Union's bases for the information demand. In fact, the Board concedes (at 6) that most of the items listed in Crozer's letter were items that Crozer represented "will *not* change," and it provides no bases in fact to believe that the Agreement would codify what *would* change or tie the buyer's hands on such subjects. (Normally, after all, the buyer is free to run a business as it wishes after the purchase.)

In sum, none of this supposed context indicates that the union's thinking was "readily apparent" to Crozer. And, because "the basis for a union's information and bargaining demand" was not apparent, Crozer had no ability to "consider" that basis. *U.S. Postal Serv.*, 18 F.3d at 1102 n.7. Here, the Board tries to flip the burden, arguing that "the onus is on the employer because it is in the better position to propose how it can best respond to a union request for information." Board Br. at 32 (quoting *U.S. Testing v. N.L.R.B.*, 160 F.3d 14, 21 (D.C. Cir. 1998)). But the case it cites, *U.S. Testing*, was referring to the *confidentiality* inquiry that occurs *after* the threshold relevancy showing is made. 160 F.3d at 21. At that stage, an employer may well be the party best situated to

know "how it can best respond." But the employer cannot know better than the union what the *union* needs for its own bargaining purposes, and the mere fact that the union intends to bargain is hardly helpful. That is why this relevancy threshold exists and why an employer with no opportunity to "consider the basis" for an information request simply cannot "violate the NLRA by rejecting the demand." *U.S. Postal Serv.*, 18 F.3d at 1102 n.7.

C. Crozer Repeatedly Denied, and Never Conceded, That It Knew the Reasoning Behind the Union's Information Demand

That leads to the Union's and Board's final alternative argument, that Crozer conceded relevance. It did not. More specifically, it did not concede the legally salient point that it knew "the *basis* for [the Union's] bargaining demand." *Hertz*, 105 F.3d at 874 (emphasis in original). To the contrary, it *denied* that it knew the Union's basis and invited the Union to explain. In other words, the concession theory proves only that no good deed goes unpunished: Crozer's representations invite the Union to articulate its need for the information and express Crozer's willingness to respond to the need once it was understood. The Union repeatedly declined to explain its thinking and demanded nothing less than the entire document *before* discussing the matter at all. That Crozer should be punished for that turns the law upside down.

The evidence could not be clearer that Crozer *denied* relevance. Ms. Bilotta's February 10 email stated "the entire APA is not relevant." JA33. That is a denial, not a concession. Ms. Bilotta's March 18 email objected to the request because "it seeks irrelevant information" and stated specifically that the

Union did not "explain why the entire document is relevant or needed." JA34. That is a denial, not a concession.

The argument that this correspondence somehow conceded relevance is based, in part, on a negative inference that, if the "entire APA is not relevant," *some* part must be relevant and, in part, on Ms. Bilotta's compromise offer for further negotiations towards the goal of producing "those portions of the Asset Purchase Agreement…that relate to or affect CKHS employees." JA34. Neither theory holds water.

The negative-inference theory is particularly weak because a negative inference that a category must contain some portion of a class of items based on a category's not necessarily including the *entire* class of items is logically deficient: the category could contain *none* of the class.[4] And what is true of raw logic is also true in the context of the correspondence: Crozer knew the entire Agreement was not relevant but chose not to foreclose the possibility that *some* portion might be relevant because, had it slammed the door, it might be accused of bargaining in bad faith. Moreover, no negative inference establishes the relevant threshold showing that the Union's reasoning was clear to Crozer.

[4] As any LSAT alumnus knows, the statement "not all children are stupid" contains the possibility that *no* children are stupid; it only precludes the inference that, because Sally is a child, she must, on that basis alone, be stupid. For the same reason, an assertion that the entire Purchase Agreement is not relevant contains the possibility that *none* of it is relevant; it only precludes the possibility that *all* of it is relevant.

To the contrary, by leaving open the possibility that portions *may* be relevant, Crozer was plainly seeking to ascertain the Union's reasoning.

Likewise, the compromise references are, read properly, efforts to learn the Union's position.[5] The context of the negotiations makes clear that Crozer simply did not know "the *basis* for its bargaining demand." *Hertz*, 105 F.3d at 874 (emphasis in original). Crozer was insistent that the *entire* Agreement was not relevant, but to know *which* part to produce if some part might be relevant, it needed information from the Union. So it asked for that information by offering on multiple occasions "to discuss which portions of the documents are relevant to PASNAP's role as bargaining representative." JA34; *see also* JA33 (quoting Ms. Bilotta's February 10 email as stating "[w]e are open to considering alternative requests you may have"). That is a direct request for the information *Hertz* holds that the Union was required to provide. And, although Crozer referenced producing some portions of the Purchase Agreement as a compromise offer, JA34, this must be understood in the context of its efforts to learn the Union's position—as the Union was stonewalling. An offer to produce what the Union might identify as relevant is not a concession that any *specific* portion of the Agreement is relevant.

[5] The excessive hindsight analysis of what Crozer meant in inviting the Union "to discuss with PASNAP the potential for production" illustrate why, in federal-court proceedings, compromise offers are inadmissible. Fed. R. Evid. 408. Crozer's efforts to find a middle ground should not have been used as a basis to find a concession that the Union was right.

The Board's error in interpreting the evidence is predicated on the misunderstanding of legal standard *Hertz* and other authorities establish. The Board found as fact that "it was clear" to Crozer that "the APA contained relevant information," JA37, but that does not amount to a factual finding that Crozer was aware of "the *basis* for its bargaining demand" or the "*facts* tending to support" that demand. *Hertz*, 105 F.3d at 874 (emphasis in original). Even if Crozer had reason to know that "portions" were relevant—and the evidence shows it did not—it had no way to answer the all-important question: *which* portions? Indeed, to this day, the Union and Board cannot identify the parts of the Purchase Agreement Crozer supposedly knew were relevant, and the unrebutted hearing testimony indicates that the union never "request[ed] particular sections of the APA." JA300. For Crozer to have identified specific portions and produced them, it would have needed what *Hertz* said it was entitled to have: an explanation of the Union's thinking. Only then could Crozer have fulfilled the requirement the Board placed on it "to indicate what portions [it] deemed irrelevant." JA37. Only after the Union's reasoning was known could Crozer provide that information.

But the Union's reasoning was precisely what the Union withheld. The Union repeatedly demanded the entire Purchase Agreement or nothing at all, and it rebuffed opportunities even to discuss its request. The Board's order faults Crozer for the parties' inability to bargain, but this too is predicated on the legally erroneous premise that the Union had no obligation to communicate its reasoning. JA37 ("the parties were not in a position to have meaningful

discussions about the scope of production because the Respondents…failed to indicate what portions they deemed irrelevant"). That is wrong as a matter of law. Only after Crozer was apprised of the Union's basis for the demand was it obligated to produce the relevant "portions" of the Purchase Agreement because only then could it identify what those portions might actually be. The Union's my-way-or-the-highway approach prevented the "meaningful discussions" the Board believed would have been appropriate, JA37, and Crozer repeatedly requested, JA34. And the fact that Crozer left open the *possibility* that the Union might be able to meet *its* burden as to *some* portions does not mean it conceded that the Union met its burden under *Hertz*.

III. The Board's Remedy Punishes Crozer for the Union's Intransigence

The Board's remedy here—forcing Crozer to hand over the complete Purchase Agreement, without any confidentiality restrictions—does not "restore the situation, as nearly as possible, to that which would have occurred but for the violation," *Sys. Mgmt., Inc. v. N.L.R.B.*, 901 F.2d 297, 308 (3d Cir. 1990) (quoting *Kallmann v. N.L.R.B.*, 640 F.2d 1094, 1103 (9th Cir. 1981)), but instead rewards the Union for its intransigence and punishes Crozer for seeking to reach an accommodation as the Act requires. Even if Crozer was obligated to produce the Purchase Agreement, in whole or in part, the proper, non-punitive remedy is to direct it to bargain in good faith with the Union over the matter, thereby putting the parties in the position that they would have been in but for any violation.

The Board's principal argument (at 50) is that a more forceful remedy is warranted because Crozer "withheld relevant information based on an unsupported claim of confidentiality." But Crozer did not withhold information on confidentiality grounds, because the Union cut off negotiations before they ever reached that point. As Crozer made clear in its correspondence with the Union, it was willing to disclose information pursuant "to the terms of a confidentiality agreement" with the Union. JA73. The Union refused to discuss the matter, and now Crozer is being punished for that. Such a remedy obviously cannot be "fairly said to effectuate the policies of the Act," Board Br. at 46 (quoting *Fibreboard Paper Prod. Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964)), because it is not "tailored to expunge only the actual…consequences of the unfair labor practices." *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984).

The Board's cited precedents do not license such a remedy in these circumstances, but only where the employer sought to evade its obligations under the Act. Thus, the employer in *U.S. Postal Service*, 364 NLRB No. 27, at *3 (2016), "ma[d]e a belated assertion of a confidentiality interest (without even offering an accommodation)," which in turn warranted a remedy preventing it from "delay[ing] any longer in producing the information." *Id*. Likewise, *Lasher Service Corp.*, 332 NLRB 834, 840–41 (2000), found such a remedy warranted where the employer "never offered to negotiate means of protecting confidentiality; [] never offered to redact names or other information or suggested other alternative means or conditions in meeting the Union's request;" and "made no offers of reasonable accommodation." And *Watkins Contracting,*

Inc., 335 NLRB 222 (2001), imposed a similar remedy after an employer made a bare assertion of confidentiality as grounds to withhold disclosure of some of its workers' names, addresses, and job-sites. None of the Board's cited cases involve circumstances like those here, where the employer identified legitimate confidentiality interests to the union and the union, in response, refused to bargain over an accommodation.

In these circumstances, as Board Member Emanuel observed, "ordering the Respondents to produce the entire [Purchase Agreement] without any conditions unfairly rewards the Union" and therefore amounts to a "punitive" remedy. JA31 (Emanuel, dissenting in part).

Conclusion

Crozer's petition for review should be granted, and the Board's cross-application for enforcement denied.

Respectfully submitted,

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Certificate of Compliance

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6,504 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT typeface.

Dated: October 15, 2018

/s/Andrew M. Grossman
Andrew M. Grossman

Certificate of Compliance with LAR 31.1(c)

I hereby certify that the text of the electronically filed brief is identical to the text of the original copies that were dispatched on October 15, 2018, by Federal Express to the Clerk of the Court of the United States Court of Appeals for the Third Circuit. I further certify that I caused a virus check to be performed on the electronically filed copy of this brief using the following virus software: Norton AntiVirus. No virus was detected.

Dated: October 15, 2018

/s/Andrew M. Grossman
Andrew M. Grossman

Certificate of Compliance with LAR 46.1(e)

Pursuant to Local Appellate Rule 46.1(e), the undersigned hereby certifies that he is counsel of record and is a member of the bar of the United States Court of Appeals for the Third Circuit.

Dated: October 15, 2018

/s/Andrew M. Grossman
Andrew M. Grossman

Certificate of Service

I hereby certify that I electronically filed the foregoing Petitioners/Cross-Respondents' Third-Step Brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on October 15, 2018. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: October 15, 2018

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